Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-2040

RICHARD F. PACILEO, SHERIFF,

Petitioner,

v.

JAMES DEAN WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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No.

RICHARD F. PACILEO, SHERIFF,
Petitioner,

v.

JAMES DEAN WALKER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, the Sheriff of El Dorado County, California, prays that a writ of certiorari issue to review the judgment or decree of the Supreme Court of the State of California entered on April 9, 1980, in the matter of James Dean Walker on Habeas Corpus.

OPINION BELOW

The judgment or decree of the

Supreme Court of the State of California, staying the extradition of James Dean Walker pending a hearing to decide the petition for writ of habeas corpus on its merits, is set out in Appendix A. It is an unreported judgment or decree which is nevertheless final as to the issues presented herein. The order denying a rehearing is set out in Appendix B.

JURISDICTION

The judgment or decree of the Supreme Court of the State of California was filed on April 9, 1980. Under California law, that order is final as to the issues raised in this petition. (See Atlantic Richfield Co. v. Superior Court (1975) 51 Cal.App.3d 168, 170; 124 Cal.Rptr. 63; Yoakum v. Small Claims Court (1975) 53 Cal.App.3d 398; 125 Cal. Rptr. 882; Lang v. Superior Court (1975) 53 Cal.App.3d 852; 126 Cal.Rptr. 122.) A

timely application for rehearing was denied on April 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether in the context of an interstate extradition proceeding, the courts of the "asylum" or "sending" state have jurisdiction to conduct an evidentiary hearing on habeas corpus to determine the merits of a fugitive's allegation that the prison in which the demanding state may incarcerate him is not presently being operated in conformance with the Eighth Amendment of the United States Constitution.

STATUTES INVOLVED

The Constitutional and statutory provisions involved are set forth in

Appendix C. They are:

United States Constitution, article IV, section 2, clause 2;

Title 18, section 3182 of the United States Code;

California Penal Code sections 1548.1 and 1548.2.

STATEMENT OF THE CASE

On December 11, 1979, the Governor of Arkansas executed a requisition for the arrest and rendition of James Dean Walker, who was then within the State of California and was alleged to be a fugitive from justice. The Governor of Arkansas submitted proof that on December 6, 1965, after being convicted of murder in the first degree, James Dean Walker was sentenced to the Arkansas State Penitentiary "for the remainder of his natural life." Walker was received by the Arkansas Department of Corrections on or

about December 14, 1965. On or about April 4, 1975, Walker escaped from the custody of the Department of Corrections. By information number 75-18, filed on or about April 11, 1975, the prosecuting attorney for Lincoln County, Arkansas, charged Walker with the crime of escape, and a bench warrant was issued for Walker's arrest.

On February 13, 1980, the Governor of California honored the request of the Governor of Arkansas and duly issued a warrant of arrest and rendition. This warrant was then served upon James Dean Walker by the Sheriff of El Dorado County.

Thereafter, Mr. Walker challenged his custody under the California Governor's warrant by successively filing petitions for writ of habeas corpus in which he alleged that the Arkansas prisons to which he would be returned violated

the Eighth Amendment proscription against cruel and unusual punishment. On February 27, 1980, the Superior Court of El Dorado County denied Mr. Walker's first petition (Appendix D). On March 6, 1980, the Court of Appeal, Third Appellate District, denied Mr. Walker's second petition for writ of habeas corpus (Appendix E). On March 12, 1980, the United States District Court for the Eastern District of California denied Mr. Walker's third petition (Appendix F).

Mr. Walker then applied to the California Supreme Court for a writ of habeas corpus. On April 9, 1980, that court issued an order directing the El Dorado County Superior Court "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United

States Constitution and thereafter decide the petition on its merits" (Appendix A). A timely petition for rehearing was denied on April 15, 1980 (Appendix B).

On April 21, 1980, upon the application of the petitioner herein, Justice Rehnquist issued an order temporarily staying the effect of the California Supreme Court's order of April 9. Justice Rehnquist ordered that a response to the application for stay be filed on or before April 28, 1980. On May 1, Justice Rehnquist continued the stay order pending the timely filing and disposition of a petition for writ of certiorari.

ARGUMENT

IN AN INTERSTATE EXTRADITION PROCEEDING, THE COURTS OF THE "ASYLUM" OR "SENDING" STATE LACK JURISDICTION TO REVIEW THE CONSTITUTIONALITY OF THE PRISONS IN THE DEMANDING STATE

The California Supreme Court has exceeded its jurisdiction and has violated article IV, section 2, clause 2 of the United States Constitution, as well as the implementing laws and interpretive decisions of this Court, by ordering that a hearing be held in a California Superior Court to determine whether the penitentiary in which the State of Arkansas intends to incarcerate James Dean Walker is currently operated in a manner which is consistent with the Eighth Amendment.

Article IV, section 2, clause 2 of the Constitution provides:

"A person charged in any State with treason, felony, or other crime, who

shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This provision has been implemented by the Congress in Title 18 of the United States Code, section 3182, and it has been supplemented by the states through the adoption of the Uniform Criminal Extradition Act. In California, the pertinent provisions are Penal Code sections 1548.1 and 1548.2.

The Extradition Clause of the Constitution and its supporting legislation have been interpreted frequently by this Court. Recently, in Michigan v. Doran (1978) 439 U.S. 282, the court stated:

"The Extradition Clause was intended to enable each state to bring

offenders to trial as swiftly as possible in the state where the alleged offense was committed. (Cit. omitted.) The purpose of the Clause was to preclude any state from becoming a santuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity." (439 U.S. at pp. 287-288.)

The court went on to note that interstate extradition was intended to be a summary

executive proceeding in which the judiciary plays an extremely limited rule. Thus:

> "Once the governor has granted extradition, a court conside.ing release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at p. 289.)

In a previous decision which is entirely consistent with Michigan v. Doran, this Court held unequivocally that the courts of an "asylum" or "sending" state may not adjudicate the

constitutionality of the conditions of prisons in the demanding state. In Sweeney v. Woodall (1952) 344 U.S. 86, 89-90, the court held:

> "The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama [the demanding state] in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State." (footnotes omitted.)

The rationale of the Sweeney decision is particularly applicable to the present case. In Sweeney, this Court was not only concerned with preserving harmony between the states, but it also eschewed the concept that a prisoner who resorted to escape and who managed to cross a state line should be able to litigate constitutional claims about his imprisonment in a foreign court. This Court noted:

> "Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State." (344 U.S. at p. 89.)

In the present case, documents

provided by the Governor of Alabama demonstrate that Walker was received by the Arkansas Department of Corrections in December 1965, and that he escaped in 1973. During that time, inmates of the Arkansas prisons filed class action suits challenging the conditions of their confinement, and the federal courts have retained jurisdiction over those claims ever since. In chronological order, the reported decisions in these cases are Holt v. Sarver (E.D. Ark. 1969) 300 F.Supp. 825; Holt v. Sarver (E.D. Ark. 1970) 309 F.Supp. 362; Holt v. Sarver (8th Cir. 1971) 442 F.2d 304; Holt v. Hutto (E.D. Ark. 1973) 363 F.Supp. 194; Finney v. Arkansas Board of Corrections (8th Cir. 1974) 505 F.2d 194; Finney v. Hutto (E.D. Ark. 1976) 410 F.Supp. 251; Finney v. Hutto

(8th Cir. 1977) 548 F.2d 740; Hutto v. Finney (1978) 437 U.S. 678; and Finney v. Mabry (E.D. Ark. 1978) 458 F.Supp. 720. In the most recent decision, Finney v. Mabry, the court tentatively approved a settlement agreement authorizing the appointment of a Compliance Coordinator to monitor and report upon changing conditions in the Arkansas prisons. Inmates who did not resort to "self help" by escaping have relied upon the federal court in Arkansas to resolve their claims and are presumably bound by the recent settlement agreement. Therefore, in the present case there are even more compelling reasons than in Sweeney why Walker should be precluded from litigating his constitutional claims in the California courts. In this case, federal relief has been available and effective.

It is apparent that the order of

the California Supreme Court is inconsistent with Michigan v. Doran and Sweeney v. Woodall. Moreover, it is apparent that the California Supreme Court did not merely abuse its discretion by ordering a hearing in California on the constitutionality of Arkansas prisons. Decisions of this Court demonstrate that the Extradition Clause limits the jurisdiction of the courts in the "asylum" or "sending" state; it does not merely suggest guidelines for the exercise of judicial discretion.

Prior to the adoption of the Constitution, the rendition of fugitives from justice was governed by principles of comity between sovereign states. (Innes v. Tobin (1916) 240 U.S. 127, 130-131.) However, in some respects, including the interstate rendition of fugitives, the Constitution limited the sovereignty of the states and imposed

binding obligations upon them. (Nevada v. Hall (1979) 440 U.S. 410, 425; Commonwealth of Kentucky v. Dennison (1860) 24 How. 66, 100-103.)

This Court has stated that "[o]ne accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that." (Ponzi v. Fessenden (1922) 258 U.S. 254, 260.) This principle was recognized by the framers of the Extradition Clause and by the Congress when it provided a procedure for the prompt arrest and delivery of fugitives. (See Appleyard v. Massachusetts (1906) 203 U.S. 222, 226-228; Matter of Strauss (1905) 197 U.S. 324, 331, 333; compare Hyatt v. Corkran (1903) 188 U.S. 691.) (Extradition Clause does not apply to persons who are not fugitives.)

The procedure established by Congress incorporates certain prerequisites to lawful extradition. It must be shown that the person arrested is charged with a crime in the demanding state, that he is a fugitive from justice, and that a proper demand has been made for his extradition. (Pierce v. Creecy (1908) 210 U.S. 387, 401.) While a person arrested for extradition may always allege that these prerequisites have not been met (McNichols v. Pease (1907) 207 U.S. 100, 109; Roberts v. Reilly (1885) 116 U.S. 80, 94), this Court has consistently held that other matters may not be considered. (E.g. Michigan v. Doran, supra, 439 U.S. 282 (asylum state's courts may not review probable cause determination by demanding state); Hogan v. O'Neil (1921) 255 U.S. 52, 55 (sufficiency of evidence to support charge may not be reviewed in asylum

state); Biddinger v. Commissioner of Police (1917) 245 U.S. 128, 135 (defenses to the criminal charge may not be considered in the asylum state); Drew v. Thaw (1914) 235 U.S. 432, 439-440 (insanity at the time of the alleged offense may not be considered in the asylum state); Strassheim v. Daily (1911) 221 U.S. 280, 283, 286 (sufficiency of evidence to support criminal charge may not be considered in the asylum state); Marbles v. Creecy (1909) 215 U.S. 63, 69 (fear for life or claimed inability to receive fair trial may not be considered in the asylum state); Pierce v. Creecy, supra, 210 U.S. 387 (technical sufficiency of indictment may not be considered in the asylum state); Pearce v. Texas (1894) 155 U.S. 311 (constitutionality of the laws of the demanding state may not be adjudicated by the asylum state); Lascelles v. Georgia (1893) 148

U.S. 537, 544-545 (potential danger to the fugitive may not be considered in the asylum state); Commonwealth of Kentucky v. Dennison, supra, 24 How. 66 (nature of the crime charged is irrelevant).)

The cases noted above demonstrate the limitations on the jurisdiction of the courts in any "asylum" or "sending" state. The need for such limitations is as great today as it was when the Extradition Clause was adopted. Modern communication and transportation enhance both the likelihood of flight across state lines and the likelihood of the eventual apprehension of such fugitives. Increased transportation costs and economic pressures on governments have increased rather than diminished the need for mutual support among the states in the area of interstate extradition.

In the present case, the Governor

of the State of Arkansas has submitted a demand for the extradition of James Dean Walker, and has supplied proof that Walker was convictedin that state of murder in the first degree, was sentenced to prison for the remainder of his natural life, and is currently charged with escaping from the custody of the Arkansas Department of Corrections. The California Governor has honored that demand and has issued a warrant for the arrest and rendition of Mr. Walker. Walker has not denied that the extradition documents are in order, that he is charged with and convicted of crimes in Arkansas, that he is the person named in the request for extradition, or that he is a fugitive from justice. Therefore, he has presented no issue over which any court within the State of California has jurisdiction. Consequently, the order of the California

Supreme Court prohibiting execution of the Governor's warrant and directing that a hearing be held to test the constitutionality of Arkansas' prisons is in excess of the court's jurisdiction and must be set aside.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be granted.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Assistant Attorney General

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Deputy Attorney General

Attorneys for Petitioner

GWB:hb
6-17-80
80YS0003

APPENDIX A

Crim. No. 21422

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re Walker on Habeas Corpus.

Supreme Court
Filed
April 9, 1980
G. E. BISHEL, Clerk

_____
Deputy

The Sheriff of the County of El Dorado is ordered to show cause before the Superior Court of El Dorado County with directions to that court to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits.

The written return shall be served and filed on or before April 21, 1980.

Pending final determination of this proceeding execution of the Governor's Warrant of Extradition is stayed, and the Sheriff of the County of El Dorado is directed not to release petitioner into the custody of any agent of the State of Arkansas.

BIRD
Chief Justice

MOSK
Justice

MANUEL
Justice

NEWMAN
Justice

Justice

Justice

Justice

APPENDIX B

Crim. No. 21422

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re Walker On Habeas Corpus.

Petition for rehearing and for stay is denied.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

BIRD
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court, this 17th day of April A.D., 19 80

Clerk,

By J. Rossi
Deputy Clerk

APPENDIX C

UNITED STATES CONSTITUTION,
ARTICLE IV, Section 2, Clause 2

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

UNITED STATES CODE

18 U.S.C. § 3182

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive

authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged."

CALIFORNIA PENAL CODE

"§ 1548.1 Governor; duty to cause arrest and delivery

"Subject to the provisions of this chapter, the Constitution of the United States, and the laws of the United States, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State."

CALIFORNIA PENAL CODE

"§ 1548.2 Demand for extradition; form and contents; documents to accompany demand; charge of crime; authentication

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed

in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF EL DORADO

Date February 27, 1980 Court met at 9:00 a.m. Dept. No. 1

PRESENT:

Hon. CHAS. F. FOGERTY, Judge

Linda English, Reporter

June L. Wills, Deputy Clerk

John Roseberry, Bailiff

Title: In the Matter of the Application of ROBERT W. GEANDROT, Petitioner

(in Behald of JAMES DEAN WALKER) for the Writ of Habeas Corpus

---

Counsel: Appearing:

RONALD TEPPER, District Attorney, for The People

PAUL GERVAIS of Gervais & Geandrot for Petitioner

Nature of Proceedings Action No. 35142

PETITION FOR WRIT OF HABEAS CORPUS (From 2/21/80)

(cont'd.)

Petitioner present;

It is Ordered that the Writ applied for is denied on the basis of lack of jurisdiction to entertain the merits of the case.

It is further Ordered that the application for a Writ of Habeas Corpus or other like remedy in the Federal Courts, the petitioner shall be allowed until 3/10/80 to apply for said Writ or Writs and pending said date, it is Ordered that JAMES DEAN WALKER be retained in custody of respondent until further Order of the Court of competent jurisdiction.

cc: District Attorney
Gervais & Geandrot, P. O. Box 1356, South Lake Tahoe, Ca. 95705

APPENDIX E

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

3 Crim. 10729

In re

JAMES DEAN WALKER,

on Habeas Corpus

By the Court:

The petition for writ of habeas corpus is denied.

Dated: March 6, 1980.

PUGLIA, P. J.

F I L E D
MAR - 6 1980
Court of Appeal-Third District
Wilfried J. Kramer, Clerk

By_____Deputy

APPENDIX F

FILED
Mar 12, 1980
Clerk, U.S. District Court
Eastern District of California
By J. L.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---ooOoo----

JAMES DEAN WALKER, Petitioner, vs. RICHARD PACILEO, Sheriff, et al., Respondents.	)	CIVIL NO. S-80-164 LKK

MEMORANDUM

Petitioner, an inmate of El Dorado County Jail is proceeding with an application for a writ of habeas corpus, seeking to challenge his imminent extradition to the State of Arkansas, on the grounds that returning petitioner to

Arkansas would be returning him to a penal system which has been declared to be in violation of the Eighth Amendment's proscription against cruel and unusual punishment and that petitioner's life would be in jeopardy, not only because of the generally brutal conditions but also because he received threats from prison officials prior to his escape. Petitioner has also requested a stay of extradition pending the court's determination of the merits of petitioner's application. A hearing was held on the latter request on March 7, 1980, with petitioner represented by Robert Geandrot and Paul Gervais and with the State of Arkansas informally represented by Robert Jibson, Deputy Attorney General for the State of California.

After hearing argument in this case

and after reading and considering the application for a writ of habeas corpus, the exhibits, and the memorandum of points and authorities, this court denied the request for the stay. This memorandum is a memorialization of the decision rendered from the bench on March 7, 1980.

The court treated the request for a stay as one for a temporary restraining order or for a preliminary injunction. This being so, the court examined the petitioner's likelihood of success on the merits and the possible irreparable injury. Finding that there was little possibility that the court would reach the merits, however, this court denied the motion for a stay. See City of Anaheim v. Kleppe, 590 F.2d 285, 288 n.4 (9th Cir. 1978); Benda v.

Grand Lodge of Int'l Ass'n, 584 F.2d 308, 315 (9th Cir. 1978).

It seems unlikely that the court would ever reach a determination on the merits because it appears that petitioner has not exhausted his state remedies. His application shows that he sought a writ of habeas corpus from the El Dorado County Superior Court and that, when this was denied, with a stay of extradition granted to allow him to seek other review, he proceeded to the California District Court of Appeal, Third Appellate District. Counsel was informed by telephone that his application for a writ of habeas corpus had been denied by that court and that no stay was granted to allow him to seek further review. Petitioner did not present his application for a writ of

habeas corpus to the California Supreme Court; rather, he filed an application in this court on March 7, 1980.

The exhaustion of state remedies is a prerequisite to the consideration of each claim sought to be presented in federal habeas corpus proceedings. See Pitchess v. Davis, 421 U.S. 482 (1975); Picard v. Connor, 404 U.S. 270 (1971); 28 U.S.C. § 2254(b). State remedies have not been exhausted unless the petitioner's federal claims have been fairly presented to the state courts and the state's highest court has considered the claims on their merits. See Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979). This exhaustion requirement has been held to be applicable to interstate extradition proceedings. See Giles v. Merrill, 322 F.2d 786,

787 (10th Cir. 1963); Tickle v. Summers, 270 F.2d 848, 850 (4th Cir. 1959); Garrison v. Smith, 413 F.Supp. 747, 751 (N.D. Miss. 1976) Sutherland v. Love, 359 F.Supp. 983, 986 (E.D. Ark. 1973). Petitioner's allegations show that he has not applied to the California Supreme Court for a writ of habeas corpus and that, therefore, he has not exhausted state remedies.

Petitioner argues that the exhaustion requirement attaches only to applications for writs brought pursuant to 28 U.S.C. § 2254. This requirement does not apply, he contends, to writs sought under 28 U.S.C. § 2241(c)(1), which provides in part, that "the Writ of Habeas Corpus shall not extend to a prisoner unless he is in custody under or by color of the authority of the

United States...."[1/] Petitioner asserts that he is in custody by the color of

---

1/ 28 U.S.C. § 2241(c) provides:

The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or action of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nationa; or

(5) It is necessary to bring him into court to testify or for trial.

(continued)

the authority of the United States because it is the extradition clause of the United States Constitution, Art. IV, § 2, and the implementing federal statutes, see 18 U.S.C. § 3181 et seq., which provide the authority for the states to issue warrants of extradition.

Even if an application for a writ of habeas corpus challenging extradition is properly brought under 28 U.S.C. § 2441 rather than under 28 U.S.C. § 2254, a question that the court does not decide,

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Footnote 1 continued:

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

the exhaustion requirement nevertheless applies. In Dye v. Johnson, 338 U.S. 864 (1949), the Supreme Court, in a per curiam opinion, reversed a decision of the Court of Appeals for the Third Circuit, which had held that the exhaustion requirement did not apply to a habeas proceeding challenging extradition, which had been brought pursuant to the predecessor statute to 28 U.S.C. § 2241. See Johnson v. Dye, 175 F.2d 250, 253 (3d Cir. 1949). As its basis for reversal, the Supreme Court cited Ex Parte Hawk, 321 U.S. 114 (1944), a case detailing the exhaustion requirement in habeas corpus proceedings. See also Garrison v. Smith, supra. No matter what the statutory basis for the instant petition, therefore, petitioner is required to exhaust his state remedies.

Petitioner also argues that if § 2254 is found to govern, subsection b of that statute controls the case and excuses his failure to exhaust state remedies. That provision states that state remedies need not be exhausted if there is an "absence of available state corrective process or existence of circumstances that render such process ineffective to protect the rights of petitioner." Petitioner contends that the extreme time pressure in this case renders the state proceedings ineffective to protect his rights. Because the District Court of Appeal, Third Appellate District, denied his application for a writ without a stay, petitioner asserts that he could not risk petitioning the California Supreme Court for fear that he would be extradited and thus lose his

remedy, should that court decline to grant a stay or the petition for a writ.

Petitioner cannot claim that the state remedies are ineffective since he has not sought to utilize them. See Fleming v. Klinger, 363 F.2d 378, 379 (9th Cir. 1966); Pate v. Wilson, 348 F.2d 900, 901 (9th Cir. 1965); Hudgins v. Circuit Court of Cheasapeake, 294 F. Supp. 258, 260 (E.D. Va. 1968). It is as possible that the state court would enter a stay of extradition or grant relief as it is that the state court would not grant a stay or the petition for a writ. Petitioner's fear that the latter possibility will come to pass does not render the state processes ineffective to protect his rights. See Fleming v. Klinger, supra. Thus, petitioner has not justified his failure

to exhaust state remedies.

The court is mindful that the exhaustion requirement is a matter of comity and is not a limitation on the power or jurisdiction of a district court to entertain an application for a writ of habeas corpus. See Picard v. Connor, supra, at 275; Harris v. Superior Court, 500 F.2d 1124, 1127 (9th Cir. 1974); cert. den., 420 U.S. 973 (1975). Comity requires that the orderly administration of justice in a state court is not to be interfered with, except in rare cases which present circumstances of peculiar urgency. See United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17 (1925); Macomber v. Gladden, 304 F.2d 487, 490 (9th Cir. 1962); Wisconsin Potowatomies v. Wilsey, 377 F.Supp. 1153, 1156 (M.D. Fla. 1974).

Federal courts should not exercise their power to consider a petition for a writ of habeas corpus except in "'cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with foreign nations.'" Id., quoting Ex Parte Royall, 117 U.S. 241 (1886) see also, United States ex rel. Kennedy v. Tyler, supra; Petition of Brabson, 167 F.Supp. 619, 621 (S.D.N.Y. 1958).[2/] Despite the seriousness of petitioner's allegations, it does not appear that the circumstances

---

2/ Petitioner's reliance on Thomas v. Teets, 205 F.2d 236 (9th Cir. 1953), is misplaced. It is true that the Court of Appeals stayed Thomas' execution pending a decision on the merits of his application for a writ of habeas corpus, but in that case, consideration of the merits was proper because Thomas had exhausted his state remedies. Id. at 241.

of this case warrant the departure from the considerations of comity underlying the exhaustion requirement. In so deciding, the court notes that the state courts share the duty of protecting constitutional rights, see Stone v. Powell, 428 U.S. 465 (1976), so that despite the court's conviction that this is not a proper case for relaxation of the exhaustion requirement, petitioner is not left without a state forum in which to air his constitutional grievances.

This court's denial of petitioner's request for a stay of extradition is based largely on its evaluation that the merits of the application for the writ would never be reached because of petitioner's failure to exhaust his state remedies. However, it is also possible that the issues raised in petitioner's

application perhaps are not cognizable in a district court in the asylum state. See Price v. Pitchess, 556 F.2d 926, 928 (9th Cir.), cert. den., 434 U.S. 965 (1977); United States ex rel. Tucker v. Donovan, 321 F.2d 114, 116 (2d Cir. (1963), cert. den. sub nom. Tucker v. Kross, 375 U.S. 496 (1964); cf. Sweeney v. Woodall, 344 U.S. 86 (1953); Ross v. Middlebrooks, 188 F.2d 308 (9th Cir.); cert. den., 342 U.S. 862 (1951); United States ex rel. Little v. Ciuros, 452 F. Supp. 388 (S.D. N.Y. 1978). In such a situation a stay would not be proper.

A final consideration convinces the court that the issuance of a stay is not the proper course to follow. In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court, faced with defining the

limits of federal judicial intervention in pending state criminal cases, announced "the fundamental policy against federal interference with state criminal prosecutions." Id. at 46. Petitioner's request for a stay of extradition is a request that this court stop an already commenced state criminal proceeding. See United States ex rel. Frisbee v. Rapone, 449 F. Supp. 509, 510 (E.D. Pa. 1978).

Petitioner has alleged nothing that would remove his case from the operation of the policy of equitable restraint announced in Younger. He has made no showing that the state courts are inadequate or inhospitable forums for his claims, nor has he alleged that the current state court proceedings are being taken in bad faith or for purposes of

harassment. See Younger v. Harris, supra, at 53; Boyle v. Landry, 401 U.S. 77, 81 (1971). Thus, the policy of Younger suggests that a stay of extradition would be improper.

For the reasons stated above, IT IS THEREFORE ORDERED that petitioner's request for a stay of extradition is hereby denied.

DATED: March 12, 1980.

MILTON L. SCHWARTZ
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
AUG 26 1980
MICHAEL RODAK, JR., CLERK

NO. 79-2040

UNITED STATES SUPREME COURT

OCTOBER TERM 1980

RICHARD F. PACILEO, SHERIFF,
Petitioner,
vs.
JAMES DEAN WALKER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 79-2040

UNITED STATES SUPREME COURT

OCTOBER TERM 1980

RICHARD F. PACILEO, SHERIFF,	)
	)
Petitioner,	)
	)
vs.	)
	)
JAMES DEAN WALKER,	)
	)
Respondent.	)
	)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICE OF THE UNITED STATES SUPREME COURT:

Respondent, JAMES DEAN WALKER, respectfully responds to the petition of RICHARD F. PACILEO for a Writ of Certiorari.

OPINION BELOW

The opinions of the California Supreme Court staying the extradition of Respondent, JAMES DEAN WALKER, and denying a rehearing are properly set out in Petitioner's brief, Appendices A and B respectively.

JURISDICTION

Respondent agrees that this Court has jurisdiction to consider the judgement or decree of the Supreme Court of California filed on April 9, 1980, if it so desires and deems appropriate and necessary.

STATEMENT OF THE CASE

Respondent concurs with the facts set forth by the Petitioner in his brief.

ISSUES PRESENTED

While in the context of an interstate extradition proceeding, the courts of the "asylum" state have jurisdiction to determine the unconstitutionality of the prison system of the "demanding" state by:

1. Affording full faith and credit to a Federal court decisions which have so found.
2. Conducting an evidentiary hearing to so determine.

Respondent submits that said petition should be denied on the following

grounds:

1. If the Respondent is returned to the State of Arkansas pursuant to its extradition request, Respondent faces death or great bodily injury.

2. The Arkansas State Prison System is unconstitutional, by law, as being in violation of the 8th Amendment to the United States Constitution in that said system inflicts cruel and unusual punishment. If returned to Arkansas, Respondent will be denied his constitutional rights and his civil rights under 42 USC §1983 will be violated.

ARGUMENT

Equal Rights & 42 USC §1983

The 14th Amendment to the United States Constitution declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Respondent is clearly within California's jurisdiction, being housed in a county jail within its confines. The 8th Amendment prohibits cruel and unusual treatment. Respondent, like any other citizen,

has a right to the equal protection of the laws to be protected against such treatment; and California has a sovereign duty to protect that right. California is thereby prohibited from aiding and abetting the infliction of cruel and unusual punishment upon it's citizens, the Respondent, by sending Respondent or allowing him to be taken back to Arkansas. These rights apply no less to a prisoner/fugitive held for extradition, than it does to free citizens or aliens. Yick Wo v Hopkins (1886) 118 U.S. 356. In Re Riddle 57 Cal 2d 842, 22 California Reporter 472, 372 P2d 304.

The civil rights of Respondent will be violated by his return to an unconstitutional prison system, under 42 USC §1983. This section protects against deprivation of "any rights, privileges, or immunites secured by the Constitution and laws". Certainly the Constitution protects against cruel and unusual treatment or punishment. U.S. ex. rel. Frisbee v Rapone (1978) 449

FS 509, Cooper v Pate (1964) 378 US 546.

Sweeney v Woodall - Michigan v Doran

Petitioner contends that this Court's decision in Sweeney vs. Woodall, (1952) 344 U.S. 86 is controlling in this case. This contention is erroneous for Sweeney stands for the proposition that a federal or state court of any asylum state cannot review a prisoner's petition for habeas corpus if the prisoner does not allege and/or prove that his rights in the demanding state may not be fully protected.

The reasoning behind Sweeney and Michigan v Doran, (1978) 439 U.S. 282 upon which Petitioner relies would appear to be two-fold: 1) An effort to promote and protect comity between states, and 2) a practical rational that it would be unfair, inconvenient, and economically burdensome for witnesses and attorneys from the demanding state to be required to travel to and defend in the asylum state.

First, we must assume that the courts of the asylym state will be fair and impartial, having no personal knowledge or interest in the Respondent. If, in fact, any possible bias or outside pressure exists, it would be upon the courts of the demanding state, from which the fugitive escapted. Secondly, in the instant case, Respondent's case does not require an evidentiary hearing, with its ramifications upon the demanding state. Respondent merely asks that the decisions of the Federal Courts and this Court, be given full faith and credit.

Holt v Sarver (E.D. Arkansas 1969) 300 FS 825; Holt v Sarver (E.D. Arkansas 1970) 309 FS 362; Holt v Sarver (8th Circuit 1971) 442 F2d 304; Holt v Hutto (E.D. Arkansas 1973) 363 FS 194; Finney v Arkansas Board of Corrections (8th Circuit 1974) 505 F2d ; Finney v Hutto (E.D. Arkansas 1976) 410 FS 251; Finney v Hutto

(8th Circuit 1977) 548 F2d 740; Hutto v Finney (1978) 437 U.S. 678; and Finney v Mabry (E.D. Arkansas 1978) 458 FS 720.

Thus, by its terms Sweeney clearly suggests that the instant case is distinquishable if Respondent before the California Supreme Court, pleaded and proved allegations contained in his petition that his rights would not, or could not, be fully protected by the courts of the demanding state. This apparently was done by Respondent, for such allegations were contained in his Petition for a Writ of Habeas Corpus before the California Supreme Court; (Exhibits B,C,D,E,F and G of Respondent's Petition for Writ of Habeas Corpus in the California Supreme Court, CRIM. #21422, are hereby incorporated by reference) implicitly acknowledged by that court's issuing order for a hearing.

Further, and in regard to the above quoted lanquage from Sweeney, the court in that case felt it was constrained from

granting the fugitive his requested habeas corpus relief by §2254 of Title 28 of the U.S.C., which was and is Congress' implementing legislation for Article IV, §2 of the Constitution. However §2254(b) of Title 28 of the U.S.C. provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." (emphasis added)

The application of this section is ably expressed in Justice Frankfurter's concerning opinion in Sweeney, found at 344 U.S. 91:

"Even so, it is appropriate to emphasize that in this case there is no sugg-

estion in the application for habeas corpus that the prisoner would be without opportunity to resort to the courts of Alabama for protection of his constitutional rights upon his return to Alabama. We cannot assume unlawful action of the prison officials which would prevent the petitioner from invoking aid of the local courts nor readily open the door to such a claim. Our federal system presupposes confidence that a demanding state will not exploit the action of an asylum state by indulging in outlawed conduct to a returned fugitive from justice."

As indicated earlier, Respondent, has shown the California Supreme Court that he faces death or great bodily injury if he is returned to Arkansas. (Exhibits B,C,D,E,F and G of Respondent's Petition for Writ of Habeas Corpus in the California Supreme Court, CRIM. #21422, are hereby incorporated by reference)

Thus, Respondent has shown "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner". The vindictive, revengeful hostility displayed in Arkansas, throughout Respondent's tenure in prison, demonstrates dramatically the danger to his life if returned.

In this case our Federal system does not presuppose confidence in the state of Arkansas' prison system, for in Finney v Arkansas Board of Correction, 505 F2d 194, 200, (8th Circuit 1974), it was held that this state's prison system was constitutionally defective. A subsequent federal decision demonstrates that this prison system is still constitutionally defective. Finney v Marby (E.D. Arkansas, 1978) 458 F. Supp. 720. Indeed, this court itself noted the unconstitutionality of Arkansas' prison system in Hutto v Finney, 437 U.S. 678 (1978).

Moreover, in this case unlawful

action of the prison officials of Arkansas can be assumed which would prevent Respondent from involving the aid of local courts, for one prison official has expressed his desire to kill Respondent. (Exhibits B,C, D,E,F and G of Respondent's Petition for Writ of Habeas Corpus in the California Supreme Court, CRIM. #21422, are hereby incorporated by reference). Obviously, a dead man cannot pursue his constitutional remedies.

Sweeney presents a constitutional conflict between fundamental considerations of humanity and decency which are reflected in the Bill of Rights and the constitutional purposes as articulated in Article IV, §2 of the Constitution. In Re Hunt, (E.D. Michigan 1967) 276 R Supp. 112, 117 (E.D. Michigan 1967). That is to say, should Respondent's interests as quaranteed by the Bill of Rights - and notably the 8th Amendment - be considered subordinate to that of promoting comity

and cooperation between the states? Should life itself be placed below mere state convenience? Clearly the answer is obvious: Respondent's interest should prevail.

The trend of decisions from this court have indicated that: "that the Supreme Court 'within the last half-century, has dealt increasingly with state administration of justice in constitutional terms.'" In Re Hunt, supra, at 117. Moreover, two eminent jurists have articulated their dissent to the consequences that Respondent will face if the dictates of Sweeney are followed.

One jurist, Judge Bazelon,stated in Johnson v Mathews, (D.C. 1950) 182 F 2d 677, 684, that:

> "Unless the Constituion is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete disregard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly the interest of the various governments of our federal system in

> the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another one promoting efficiency and comity between states, the other protecting fundamental rights of the individual against state infringement our system of government will be better served by assessing greater weight to the latter. Serious doubt concerning the effectiveness of future quarantees of such fundamental rights ought not to be resolved by speculation or presumption that somehow, somewhere, but not here, some court will be able to prevent a repetition of past abuses."

Indeed, during the course of his dissent, Judge Bazelon noted the obvious inadequacy of a extradited prisoner's habeas corpus remedy to pursue his constitutional rights if he faces barbaric treatment or death. Johnson v Mathews, supra at 686.

The second jurist, Justice Douglas of this court, in his dissenting opinion in Sweeney, not only echoed Judge Bazelon's dissent, but candidly stated his constitutional and humane objections to the holding of Sweeney.

"I rebel at the thought that any human being, negro or white, should be forced to run a gamut of blood and terror in order to get his constitutional rights. That is to great a price to pay for the legal principle that before a state prisoner can get federal relief he must exhaust his state remedies."

The attitude of Arkansas and some other states toward their prisons appears to be that we are trying to correct the problems, just give us time; they're not all that bad. The Constitution cannot afford to be bent, relaxed, or ignored. The court in Ramos v Lamm, 485 FS 122, 168, expressed Respondent's position on this point:

"As I said in ruling from the bench, the Constitution does not permit cruel and unusual punishment today on the theory that somewhere down the line it might be corrected. To quote from Judge Henley's landmark decision in Holt v Sarver, 309 FS at 383, 'the handwriting is on the wall, and it ought not to require a Daniel to read

it'". The Holt case was the first decision in Arkansas, 10 years ago, declaring the system unconstitutional. It remains so today.

Petitioner discusses the need for comity among states, the interests of justice in prosecuting fugitives, and the certainty that inmates will flee across state lines and be protected, if this court denies his petition. Petitioner never comes to grips with the fact that if the penal system of Arkansas only, only meets constitutional standards, no relief would be available to Respondent. Is it so much to ask that a state comply with those minimal standards, to insure a fugitive's constitutional rights, just as the state is required to insure those of its free citizens? I suggest that a prisoner is a captive recipient of unlawful conditions: He may not merely move to another area. The constitutional rights of a citizen must be held paramount, and those inalien-

able rights protected.

CONCLUSION

WHEREFORE, Respondent, JAMES DEAN WALKER, respectfully requests that the Petitioner's petition be denied.

Respectfully Submitted,

R. W. Geandrot

ROBERT W. GEANDROT

DATED: 9-8-80

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

NO. 79-2040

UNITED STATES SURPEME COURT

OCTOBER TERM 1980

RICHARD F. PACILEO, SHERIFF,
Petitioner,

vs.

JAMES DEAN WALKER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

SUPPLEMENTAL POINTS AND AUTHORITIES IN RESPONSE TO PETITION OF WRIT OF CERTIORARI

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ARGUMENT

Respondent respectfully submits that following its own guidlines estab-lised in the case of Resque Army vs Municipal Court (1947) 331 U.S. 549, 67 Sup. Ct. 1409, this Honorable Court should decline to exercise jurisdiction in this case.

In the above cited case, a Writ of Prohibition was sought to prohibit pending prosecution for violation of municipal or-dinances governing the solicitation of con-tributions for charity. The Supreme Court of California denied the Petition for Writ of Prohibition and that denial was appealed to the U.S. Supreme Court. The Court de-cided ".....this Court has followed a policy of strict necessity in disposing of con-stitutional issues." At page 568. This Court further delineated its position by adding that the Court has developed for its own governance in the cases expressly within its jurisdiction, a series of rules under which it has avoided passing upon a

large part of all the constitutional questions pressed upon it for decision. Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings: in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one that fails to shown that he is injured by the statutes of operation, or who has availed himself of its benefits; or if a construction statue is fairly possible by which the question may be avoided. At page 568-569.

The court continued by saying that the relief is neither sought nor needed beyond adjudication of the jurisdictional issue. The suit seeks only in substance, a traditional declaration that jurisdiction does not exist in the municipal court. But,

for a variety of reasons, the shape in which the underlying constitutional issues have reached this court presents, we think, insuperable obstacles to any exercise of jurisdiction to determine them. Those reasons comprise obstacles of prematurity, and comparative abstractness arising from the nature of the proceeding in prohibition and the manner in which the parties have utilized it for presenting the constitutional questions. At pages 574-575.

"In the first place, the constitutional issues come to us in highly abstract form, the ....record presents only bare allegations that he was charged criminally...., and that those sections are unconstitutional, on various assignments, as applied to his alleged solitictations. We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial." At page 575.

The Court concluded that the defendant's rights could be assured of pro-

tection, even though, at the trouble and expense of undergoing another trial. Those inconveniences, conceedlingly substantial, do not outweigh the strong considerations relative to the court's function dictating that it should undertake a task at once so speculative and so foreign to them. At page 579.

In the case at bar, this Court is presented with the same problems of prematurity and abstractness dealt with in the case of Resque Army. There has been no factual determination as to the constitutionality of the Arkansas prison system, nor the type, manner, source or severity of alleged threats to Respondent's life.

For these reasons, the Respondent believes that this Court should decline to exercise jurisdiction in this case.

Respectfully submitted,

R.W. Geandrot

ROBERT W. GEANDROT,

Supreme Court, U. S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

RICHARD F. PACILEO, SHERIFF ..... *Petitioner*

vs. No. 79-2040

JAMES DEAN WALKER ..... *Respondent*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATES OF ARKANSAS AND INDIANA AS AMICI CURIAE

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

RICHARD F. PACILEO, SHERIFF ..... *Petitioner*

vs. No. 79-2040

JAMES DEAN WALKER ..... *Respondent*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATES OF ARKANSAS AND INDIANA AS AMICI CURIAE

INTEREST OF AMICI

This brief is filed by Amici pursuant to Rule 42(4) of the Rules of the Supreme Court.

The State of Arkansas is interested in this case for two reasons: (1) it is the state demanding the return of the respondent, James Dean Walker; and (2) during 1979, Arkansas was involved in 295 extradition proceedings and Arkansas was the demanding state in 208 of these proceedings.

The State of Indiana was involved in approximately 300 extradition proceedings in 1979 and was the demanding state in 180 of these proceedings.

Because of the number of extraditions in which the Amici are involved, each is potentially affected by the ruling of the California Supreme Court. Were this Court to adopt that court's ruling, the impact on each of the Amici, as well as other states of the Union, would be most profound.

OPINION BELOW

The judgment or decree of the Supreme Court of the State of California, staying the extradition of James Dean Walker pending a hearing to decide the petition for writ of habeas corpus on its merits, is set out in Appendix "A" to petitioner's Petition for Writ of Certiorari. It is an unreported judgment or decree which is nevertheless final as to the issues presented herein. The order denying a rehearing is set out in Appendix "B" to petitioner's petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether in the context of an interstate extradition proceeding, the courts of the "asylum" or "sending" state have jurisdiction to conduct an evidentiary hearing on habeas corpus to determine the merits of a fugitive's allegations that the prison in which the demanding state may incarcerate him is not presently being operated in conformance with the Eighth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Art. IV, §2, cl. 2 of the United States Constitution:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

SUMMARY OF THE ARGUMENT

The order of the California Supreme Court is violative of the Extradition Clause of Art. IV, §2, cl. 2 of the United States Constitution once the governor of an asylum state has ordered the arrest and return of a fugitive sought by the demanding state, the courts of the asylum state in a habeas corpus petition can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner sought has been charged with the crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. The courts of the asylum state have no jurisdiction to conduct hearings as to the constitutionality of the prison of the demanding state in which the petitioner would be held.

If the Order of the California Supreme Court is upheld, it would enable any fugitive making his way into a state other than the one seeking him, to force the demanding state to litigate the constitutionality of its prison system in a foreign state having no jurisdiction over that system. The result of this would be a "balkanization" of the administration of criminal justice among the states of the union.

ARGUMENT

The respondent, James Dean Walker, was convicted of the first degree murder of a North Little Rock, Arkansas, policeman in December, 1965. His conviction was unanimously affirmed by the Arkansas Supreme Court in *Walker v. State*, 241 Ark. 300-321, 408 SW2d 905 (1966), *certiorari denied, Walker v. Arkansas*, 386 U.S. 682 (1967). Walker subsequently petitioned the federal courts for

Habeas Corpus relief, pursuant to 28 U.S.C. §2254. This petition was denied. *Walker v. Bishop,* 295 F. Supp. 767 (E.D. Ark. 1967), *affirmed,* 408 F.2d 1378 (8th Cir. 1969).

In April, 1975, Walker escaped from the Arkansas Department of Correction and remained at large until he was apprehended in South Lake Tahoe, California in 1979. The Governor of the State of Arkansas submitted his request for respondent Walker's extradition to the Governor of California. On February 13, 1980, the Governor of California honored Arkansas's request and issued a warrant of arrest and rendition. The respondent subsequently attacked the Governor's order via petitioning for habeas corpus wherein he alleged that his confinement in the Arkansas Department of Correction was violative of the Eighth Amendment to the United States Constitution.

On February 27, 1980, the Superior Court of El Dorado County denied Mr. Walker's first petition. On March 6, 1980, the Court of Appeals, Third Appellate District, denied Mr. Walker's second petition for writ of habeas corpus. On March 12, 1980, the United States District Court for the Eastern District of California denied Mr. Walker's third petition.

Mr. Walker then applied to the California Supreme Court for a writ of habeas corpus. On April 9, 1980, that court issued an order directing the El Dorado County Superior Court "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits." A timely petition for rehearing was denied on April 15, 1980.

On April 21, 1980, upon the application of the petitioner herein, Mr. Justice Rehnquist issued an order temporarily staying the effect of the California Supreme Court's order of April 9. Mr. Justice Rehnquist ordered that a response to the application for stay be filed on or before April 28, 1980. On May 1, Mr. Justice Rehnquist continued the stay order pending the timely filing and disposition of a petition for writ of certiorari.

The order of the California Supreme Court is violative of Art. IV, §2, cl. 2 of the United States Constitution and is in excess of its jurisdiction.

Art. IV, §2, cl. 2 of the United States Constitution provides:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The meaning and purpose of this provision, was made clear by this Court in *Michigan v. Doran,* 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed. 2d 521 (1978), wherein it held.

> "The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. Biddinger v. Commissioner of Police, 245 U.S. 128, 132-133, 62 L.Ed. 193, 38 S.Ct. 41 (1917); Appleyard v. Massachusetts, 203 U.S. 222, 227, 51 L.Ed. 161, 27 S.Ct. 122 (1906). The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state

and thus "balkanize" the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity. Compare Biddinger, supra, with McLeod v. Dilworth Co., 322 U.S. 327, 330, 88 L.Ed 1304, 64 S.Ct. 1023 (1944). In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy.

Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, §2, cl. 2, of the Constitution. Biddinger, supra, at 132, 62 L.Ed. 193, 38 S.Ct. 41; In re Strauss, 197 U.S. 324, 332, 49 L.Ed. 774, 25 S.Ct. 535 (1905); R. Hurd, A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus 598 (1858). The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial."

Michigan v. Doran, supra, 439 U.S. at 287-288.

The Court went on to further dileneate the parameters of habeas corpus once the governor of the asylum state has granted extradition:

"Whatever the people of discretion vested in the governor of an asylum state, cf. Kentucky v. Denni-

> son, 24 How. 66, 107, 16 L.Ed. 717 (1861), the courts of an asylum state are bound by Art. IV, §2, cf. Compton v. Alabama, 214 U.S. 1, 8, 53 L.Ed. 885, 29 St.Ct. 605 (1909), by §3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. Bassing v. Cady, 208 U.S. 386, 392, 52 L.Ed. 540, 28 S.Ct. 392 (1908). Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable."

Michigan v. Doran, supra, 439 U.S. at 288-289.

In spite of this clear language, the California Supreme Court here held that respondent Walker was entitled to a hearing in the California courts as to the constitutionality of the Arkansas penitentiary in which he would be held. It is not expressly clear from the California Supreme Court's order as to what the end result of their inquiry would be. It is clear that the California Supreme Court has no jurisdiction over the institutions of the State of Arkansas and therefore its Order would have no legal effect on the State of Arkansas. *Bigelow v. Virginia*, 421 U.S. 809, 822-825 (1975); *McLeod v. Dilworth Co.*, 322 U.S. 327, 330 (1944); *Mertz v. Mertz*, 271 N.Y. 466, 3 NE2d 597, 598 (1936); *Quong Ham Wah Co. v. Industrial Accident Commission*, 184

Cal. 26, 192 P. 1021, 1025 (1920), *dismissed,* 255 U.S. 445 (1921); *Whitney v. Dodge,* 105 Cal. 192, 38 P. 636, 637 (1894).

The California court's order is implicitly clear, however, that should Arkansas be unsuccessful in its efforts to vindicate its penitentiary system in the California courts, respondent Walker would be entitled to Habeas Corpus relief.

In 1952, this Court patently rejected the procedure which the California Supreme Court has sought to mandate here. In *Sweeney v. Woodall,* 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114 (1952), the respondent, a fugitive from Alabama, resisted extradition from Ohio by alleging that the conditions of his Alabama confinement were violative of the Eighth and Fourteenth Amendments. In rejecting his contention, this Court stated:

> "In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits.
>
> Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action

brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 USC §2254, and under the doctrine of Ex parte Hawk (US) supra, he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned.

The District Court properly dismissed the application for habeas corpus on its face, and the Court of

> Appeals erred in holding that the applicant was entitled to a hearing in the District Court of Ohio on the merits of his constitutional claim against prison officials of Alabama."

Sweeney v. Woodall, supra, 344 U.S. at 88-90.

In making its decision in *Sweeney*, this Court cited to an earlier case, *Johnson v. Matthews,* 182 F.2d 677 (D.C. Cir. 1950), *Sweeney v. Woodall,* supra, 344 U.S. at 88. In *Johnson,* the court rejected a fugitive's contention that the asylum state, (there, the District of Columbia), should conduct a hearing into the constitutionality of his treatment by the demanding state. In rejecting Johnson's claim the court there noted:

> "The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities, sound theory of government, and the practical aspects of the problem all require that conclusion.[5]

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[5]. 2 Story Constitution §1809 (5th ed. 1891): "But, however the point may be as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the national government. It will, moreover, give strength to a great moral duty, which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character."

The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government. The quoted provision of the Constitution is in the nature of a treaty stipulation between the states, and compliance is a matter of agreed executive comity. In Appleyard v. Massachusetts[6] the Supreme Court said: 'The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states, — an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.'

While the provision of the Constitution, being specific in its reference to 'State', may not apply to the District of Columbia, the same basic theory underlies the federal statute which clearly does apply. Both Constitution and statute are explicit and

6. 1906, 203 U.S. 222, 227-228, 27 S.Ct. 122, 124, 51 L.Ed. 161, 163, 7 Ann. Cas. 1073.

mandatory. They require — not merely suggest — that the fugitive, having been secured, be delivered to the demanding state.

The law of nations, absent treaties, contemplates that every nation control the entrance *vel non* of persons into its borders; those whom it wishes to stay, stay.[7] Since almost every nation wishes, however, to enforce its criminal laws without nullification by the criminal through the simple expedient of leaving the country, treaties of extradition are general throughout the world.[8] The complete chaos which would have enveloped law enforcement in the American colonies in the absence of extradition agreements became evident long before the Constitution was written. Such an agreement was incorporated in the Articles of Confederation.[9] Without debate it was continued in the Constitution.[10]

The Federal Government has no function in this interstate arrangement, except that its courts may see, upon petition for *habeas corpus,* that the states abide the compact; and, of course, its territories must obey the statute. To say that the federal courts may interpose in this process their judgment of the internal processes of the states and the fidelity of their officials to their duties, is to nullify the agreement

7. 2 Hyde, International Law 1012, 1015 (2d rev.ed. 1945). See also 1 Curtis, Constitutional History of the United States 605-606 (1889); 2 Story, op. cit. supra note 5, §1808 n. (a); 1 Cooley, Constitutional Limitations 52 (8th ed. 1927).

8. 2 Hyde, op. cit. supra note 7, at 1016 et seq.

9. Art. IV, par. 2.

10. 2 Story, op. cit. supra note 5, §1807; 1 Curtis, op. cit. supra note 5, at 601-604; 1 Elliot, Debates 229, 272, 304 (2d ed. 1888).

embedded in the Constitution and to reestablish the rule of the law of nations which it was intended to disestablish. The federal courts have no power to nullify a provision in the Constitution.

Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. Not only state courts but a complete system of federal courts are there.

The basic premise of appellant's position is that he could not get fair treatment in the courts of Georgia, either state or federal. Every argument in support of power in the District of Columbia court to consider and determine whether appellant should be released because of anticipated ill-treatment by executive officers of Georgia comes in the final analysis to the essential proposition that appellant's rights would not be protected by the courts of Georgia. Those courts are there. They are charged with the duty of protecting this prisoner and any other in custody in that state. If they perform that duty, appellant would be as adequately protected by their order as he would be by an order of the court here; he would have no basis for applying to the court here.

We are asked to assume that appellant would not be protected by the courts in Georgia. We not only decline to make the assumption but we repudiate

the suggestion that we make it. We will not impugn either the capacity or the integrity of the state courts of Georgia or of any other state. And even if we were to assume, upon the basis of this fugitive's allegations, that the state courts are impervious to his assertions, we would make no such asumption concerning the federal courts having jurisdiction in that state. Those courts of the United States are as capable and faithful as are the courts of this or any other jurisdiction. If that Court of Appeals errs, *certiorari* to the Supreme Court will lie.

If we will not assume the non-availability of courts in Georgia, we are asked to permit petitioner to present evidence upon that non-availability and then to determine the question. There is an established procedure for the correction of error or dereliction on the part of every court in the country, and where constitutional rights are involved the Supreme Court of the United States stands watchman over every court, state or federal. It would be an act of unwarranted arrogance for us to ascribe to ourselves virtue superior to that of other courts and so to assert power to hear and determine the faithfulness to duty of a sister court occupying a place like ours in the federal system. We have not the slightest semblance of authority over such courts. We might differ with them in opinion, but to us the availability of the Georgia federal courts to protect appellant is not 'merely a presumption'."

Johnson v. Matthews, supra, 182 F.2d at 679-681; also see, *Price v. Pitchess*, 556 F.2d 926, 928 (9th Cir. 1977); *United States v. Donovan*, 321 F.2d 114, 116 (2nd Cir. 1963); *Garri-*

son v. Smith, 413 F. Supp. 747, 756-757 (N.D. Miss. W.D. 1976); *Kyles v. Preston,* 253 F. Supp. 628, 629 (D.C.D. 1966).

The argument might be raised that this case has different ramifications from *Sweeney* in that the Arkansas prison system was declared unconstitutional. The amici note that at this point in time, at least part of the prison system of 19 states have been declared unconstitutional and the systems of 10 other states are currently under challenge on constitutional grounds.[1] Thus, the prison systems of *more than one-half* of the States are accused of or have been found to be unconstitutional in some aspect. Amici note in passing that while the California penal system has not been ruled unconstitutional, its record has not been spotless. In a race riot at Soledad prison on August 19, 1979, two guards and twenty inmates were injured. On February 15, 1980, some 600 inmates seized eight dormitories at the Chino Institution, setting fires and smashing furniture.

Such contention would ignore the main principle of *Sweeney, Doran* and *Johnson*; namely, that the State and federal courts of the demanding state are the proper forum for resolution of the fugitive's allegations.

The emphasis in both *Sweeney, Doran* and *Johnson* on the ability of the federal courts of the demanding state to

[1]"National Prison Project Status Report — The Courts and Prisons", April 1, 1980. At least part of the prison system has been declared unconstitutional in the following states: Ohio, Illinois, Missouri, Colorado, Arizona, Florida, New Hampshire, Delaware, Maryland, Kentucky, Wyoming, Georgia, Alabama, Mississippi, Louisiana, Tennessee, Oklahoma, Arkansas, and Rhode Island. The States whose systems are now under constitutional challenge are: Maine, Massachusetts, North Carolina, South Carolina, Indiana, Texas, New Mexico, Utah, Iowa and Nevada.

protect the rights of prisoners in those states is not lost here. A long line of inmate litigation regarding constitutionality of Arkansas prison conditions culminated in the consent decree embodied in *Finney v. Mabry,* 458 F. Supp. 720 (E.D. Ark. 1978). Pursuant to that decree, a Compliance Coordinator was retained and the parties to the decree now anticipate that full compliance will occur on or about March 1, 1981. Also, since September, 1979, Arkansas has had a new director of corrections, and a new warden at the Cummins unit, both of whom were brought in from out-of-state. Of course, the Amicus from the State of Arkansas would not expect respondent, Walker, to know this since he elected to "take a hike" five years ago.

In view of these developments and the long line of decisions noted in the petitioner's brief at pages 14 and 15, it goes without saying that the federal courts in Arkansas have been most attentive and protective of the rights of Arkansas prisoners.

The order of the California Supreme Court is erroneous in another aspect. If the order is held valid, the ramifications would be cataclysmic for extradition throughout the United States. As the Court noted in *Michigan v. Doran,* supra:

> "The purpose of the [extradition] clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states." 439 U.S. at 287.

If the California Supreme Court's order is left standing, the result will be that *any* fugitive of *any* state who is able to make it across the state line and into an asylum

state will, upon apprehension, be able to challenge the constitutionality of the prison system of the demanding state. Pursuant to the holding of the California Supreme Court, a hearing would then be necessary on that issue in the asylum state.

The result of this would be that justice would be delayed and frustrated while officials of the demanding state were forced to bivouac in the asylum state and defend their institutions before a court which had no jurisdiction over these institutions.

As noted in the Interest of Amici statement, in 1979, Arkansas was involved in 295 extradition proceedings, and was the demanding state in 208 of those proceedings. During the same period, Indiana handled approximately 300 extraditions, 180 of which it was the demanding state. It does not take an Einstein to realize that the cost of litigating the constitutionality of their prisons in the fugitives' asylum states could easily run into millions of dollars annually. The result would be that states from which a fugitive fled would be forced to choose between cuts in state spending in other areas of social concern, financial disaster, or, simply forgetting the extradition of fugitives altogether.

Amici submit that it was just such absurd results which the founding fathers sought to avoid by the implementation of the Extradition Clause. This Court, through the years, has consistently agreed. *Michigan v. Doran*, supra; *Sweeney v. Woodall*, supra; *Dye v. Johnson*, 338 U.S. 864 (1949); *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); *Marbles v. Creecy*, 215 U.S. 63, 69 (1909); *Innes v. Tobin*, 240 U.S. 127 (1916); *Appleyard v. Massachusetts*,

203 U.S. 222, 226-228 (1906); *Lascelles v. Georgia*, 148 U.S. 537, 544-545 (1893).

In sum, the order of the California Supreme Court is violative of Art. IV, §2, cl. 2 of the Constitution, as well as being in excess of its jurisdiction. The Order, if upheld, would work an intolerable hardship on each of the United States and would amount to an emasculation of the Extradition Clause.

CONCLUSION

For the foregoing reasons and authorities of law, the amici pray that the writ of certiorari in this matter be granted.

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